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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY'S FEES AND SUPPORTING BRIEF

LEE JOHNSON
Attorney General of Oregon

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STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY FEES

Respondent respectfully moves the Court for an Order awarding it a reasonable attorney's fee, either as costs or as damages, and directing the clerk to enter the amount thereof in the body of the mandate, pursuant to Rule 57, par. 6, of the Rules of this Court.

Attacher hereto and incorporated herein by this reference marked, respectively, Exhibits "A" and "B", are the affidavits of Leslie B. Hampton and Bruce M. Hall.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L, BARRIE
Assistant Attorney General
and Counsel

LESLIE B. HAMPTON
Assistant Chief Trial Counsel

By Leslie B. Hampton
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BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR ALLOWANCE OF ATTORNEY FEES

The substantive right to a reasonable attorney's fee in this case, in addition to the usual taxable costs, initially arises from ORS 743.114, which provides as follows:

> "743.114 Recovery of attorney fees in action on policy. If settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon.
> [Formerly 736.325; 1971 c. 123 § 1]"

Pursuant thereto, the trial court awarded plaintiff (Respondent here) reasonable attorney's fees in the trial court, as against Defendant, Travelers Indemnity Company (one of Co-Petitioners here), and such award was affirmed on appeal to the Court of Appeals of the State of Oregon. *Oregon State Highway Commission v. DeLong Corporation*, — Or. App. —, 495 P2d 1215, 1231-1233, 94 Or. Adv. Sh. 983 (1972). An additional award was made for attorney's fees in the State Appellate Court.

The proceedings in this Court on Petition for Certiorari were, of course, in the same action commenced, tried and appealed in the Oregon courts. Petitioners sought review by this Court of the state court judgment, and pursuant to the intent of the statue, a furher

allowance should be made herein, taxed as part of the costs in this Court. The statute provides that attorney fees, in a reasonable amount to be fixed by the court ". . . shall be taxed as part of the costs of the action and any appeal thereon." ORS 743.114, *supra*.

When ORS 743.114 is otherwise applicable, the right to attorney fees as therein provided has been uniformly enforced by the lower federal courts, in actions commenced within the District of Oregon. *Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Casualty Co.*, 465 F2d 22, 25 (9th Cir. 1972); *New York Life Insurance Company v. Lee*, 232 F2d 811, 815 (9th Cir 1956); *Staff Jennings, Inc. v. Fireman's Fund Insurance Company*, 218 F. Supp. 112 (D.C. Or. 1962).

Although Rule 57, par. 1, refers to allowance of costs in this Court in "cases of affirmance of any judgment", there would appear to be little doubt that there is similar power upon denial of a Petition for Certiorari.

Rule 57, par. 1, provides that in cases of affirmance, "costs shall be paid by appellant *or petitioner* unless otherwise ordered by the court." This clearly contemplates that costs should be taxed in proceedings on certiorari as well as in direct appeals.

Rule 56, par. 4, also provides that where it appears that a petition for certiorari has been filed although there is no ground for granting such a writ, the court may in appropriate cases adjudge to the respondent reasonable damages for the delay. Or, under par. 2 of the same Rule, damages not exceeding 10 percent may be awarded where an appeal delays proceedings on the

judgment below and appears to have been sued out merely for delay. Either or both of these provisions might also be deemed applicable here.

As to the enabling statute, 28 USC § 1912, it was decided long ago that the authority of this Court to award damages for delay pursuant to Court Rule,[1] under the predecessor to 28 USC § 1912, existed when a writ of error was dismissed for frivolity, as well as when the judgment below was affirmed upon such ground; the statute in its then form (Rev. Stat. § 1010) authorized damages for delay in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court . . ." *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 33 S. Ct. 80, 57 L. Ed. 140 (1912).

It is also pertinent to observe that where a direct appeal is improvidently taken to this Court, it may be treated as a petition for certiorari, and where in such a case no reasonable ground for certiorari is apparent, this Court may adjudge to the respondent reasonable damages for the delay, and single or double costs. 28 USC § 2103. Certainly if what should have been a petition for certiorari is through improvidence presented as a direct appeal, and damages and costs may be awarded respondent in such case, a like award is also proper where the proceeding was initially presented as a petition for certiorari.

Thus, it is clear that under state law, respondent is entitled to a reasonable attorney's fee from Travelers in this case, as a part of its costs, not only in the trial

[1] Similar to present Rule 56.

court, but in subsequent appellate proceedings. The lower federal courts have allowed recovery of such a fee in cases to which the statute otherwise applies, even though the action was initiated in the federal court system. This Court has ample authority under its rules and 28 USC § 1912 to allow recovery of such a fee in this case, either as "costs" or as damages.[1]

It is obvious from the length and nature of the Petition herein, and of Respondent's Brief in Opposition thereto, that respondent was indeed delayed in proceeding to enforce its judgment and that it has incurred substantial actual costs, including attorney fees, as a result of the ill-founded proceeding in this Court.

Under these circumstances, we submit that it is not only permissible, but altogether reasonable, fair and just that respondent be allowed a reasonable attorney's fee in this Court.

As to the amount, respondent has submitted with its Motion the Affidavit of Bruce M. Hall, a qualified and experienced attorney and a member of the bar of this Court, expressing the expert opinion that a reasonable attorney's fee to respondent for the proceedings in this Court would be $22,500 to $25,000.

If this be deemed an appropriate case for imposition of delay damages under Rule 56, such rule allows an award up to 10 percent, in addition to interest, of the amount of the judgment. The principal amount of the judgment in this case, exclusive of interest, attorney's fees and costs, is $2,671,864.19[2]. Ten percent of that sum

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[1] If an award is deemed appropriate as costs authorized under ORS 743.114, it appears that it would properly be as against Travelers Indemnity Company only; if the Court deems such an award appropriate as damages it would apparently be entered as against both petitioners.

[2] See opinion below, 495 P2d 1215, 1219.

is $267,186.42. While respondent does not contend that an award of 10 percent damages would necessarily be appropriate in this case, this nevertheless indicates that Mr. Hall's opinion as to a reasonable attorney's fee is not disproportionate.

If this case had originated in the Federal District Court for Oregon it would be appropriate to file this motion in that court. *Perkins v. Standard Oil Company of California,* 399 U.S. 222. We are assuming that in a case originating in the Oregon state courts the motion should be filed in this Court.

Respondent respectfully urges that this Court exercise its authority to award $22,500 to $25,000, or such other amount as it deems reasonable as and for respondent's attorney fees in this matter, and direct that such award be entered in the mandate, pursuant to Rule 57, par. 6.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L. BARRIE
Assistant Attorney General
and Counsel

LESLIE B. HAMPTON
Assistant Chief Trial Counsel

By Leslie B. Hampton
Counsel of Record
State Office Building
Salem, Oregon 97310
Phone (503) 378-4402

Exhibit "A"—Affidavit

In the Supreme Court of the United States

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, Leslie B. Hampton, being first duly sworn depose and say that:

I am an Assistant Attorney General, and counsel for Respondent in the above-captioned cause. That I have been associated with the preparation and trial of this case since approximately June, 1967. I participated in all phases of the deposition and discovery proceedings and was in daily attendance during the lengthy trial and supplemental procedings in the State trial court.

I was directly involved with the appeal of this case in the State appellate courts and had a substantial part

in the planning of the State's defense to the appeal and the planning and review of the State's Briefs in said State Appellate courts.

I have been directly responsible for Respondent's defense to Petitioner's Petition for Writ of Certiorari in this case.

The Highway Commission retained attorney A. H. Johansen to assist me in Respondent's defense. Mr. Johansen is a former Assistant Attorney General and participated in all phases of the preparation and trial of this cause in the State trial courts and in the State appellate courts. He was primarily responsible for writing the Respondent's Brief in the Court of Appeals of the State of Oregon, which Brief is part of the designated record herein. Mr. Johansen resigned from the Attorney General's staff on October 31, 1970. Thereafter, he was retained to assist in the completion of the state appellate court proceedings.

As an Assistane Attorney General, I keep time records recording the time devoted to individual assignments. I devoted 161 hours of my time exclusively to this proceeding. Mr. Johansen devoted 71 hours of his time exclusively to this proceeding. All but 10 hours of his time has been billed to the Highway Division. The balance will be billed at the end of this month. Mr. Johansen and I have been admitted to practice approximately 15 years and 20 years respectively. Both of us have had substantial experience in the trial courts and the appellate courts of Oregon. In my opinion the total

time devoted to this proceeding was reasonable and necessary.

DATED on the 25th day of May, 1973.

LESLIE B. HAMPTON
Assistant Chief Trial Counsel

Subscribed and sworn to before me this 25th day of May, 1973.

JUDY A. LeFORCE
Notary Public for Oregon
My Commission Expires: 1-28-77

SEAL

Exhibit "B"—Affidavit

In the Supreme Court of the United States

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

vs.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

STATE OF OREGON)
) ss. AFFIDAVIT
County of Multnomah)

I, Bruce M. Hall, being first duly sworn, depose and say:

That I am a practicing attorney in the city of Portland, Oregon. That my firm is Hall and Novak, 400 Jackson Tower, Portland, Oregon. My practice includes matters in the Federal Courts, including the District Court for Oregon, the Court of Appeals, Ninth Circuit and the United States Supreme Court.

I am generally familiar with the pleadings and issues in the State court trial of this proceeding. I testified for

the Highway Commission at the hearing to set a reasonable attorney fee in the trial court.

I have examined the Briefs filed by the Petitioners and the Respondent, State of Oregon, in this proceeding. I have been advised by counsel for Respondent that 232 hours of attorney time have been devoted to this proceeding.

Considering the novelty, magnitude and complexities of the litigation, the time and labor involved, the ability and standing of the attorneys performing the services and the ability and standing of opposing counsel, the customary charges of the bar for similar services, the amount involved and the results obtained for the client, it is my opinion that an attorney fee ranging from $22,500 to $25,000 would be a reasonable sum to be awarded Respondent herein.

DATED this 24th day of May, 1973.

BRUCE M. HALL
Attorney at Law

Subscribed and sworn to before me this 24th day of May, 1973.

STEPHANIE SLATER
Notary Public for Oregon
My Commission Expires: 1/24/75

SEAL